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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

NATHAN KORMAN, Plaintiff and Appellant, v. JOHN W. HILL & ASSOCIATES, INC., et al., Defendants and Respondents.	B189738 (Los Angeles County Super. Ct. No. BC323168)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed.

Law Offices of John Belcher and John A. Belcher for Plaintiff and Appellant.

Robie & Matthai, Edith R. Matthai and Natalie A. Kouyoumdjian for Defendants and Respondents.

A boy injured in his apartment sued his landlord. The landlord's insurer provided a defense, but rejected the boy's offer to compromise for policy limits, and a jury ultimately awarded the boy both compensatory and punitive damages. The insurer paid the compensatory damages (including those exceeding policy limits) and the landlord paid the punitive damages -- and then sued his lawyer for negligence and breach of contract, alleging it was the lawyer's fault the underlying case did not settle. The trial court granted the lawyer's motion for summary judgment. We affirm on the ground that, as a matter of law, the landlord cannot establish causation.

FACTS

The Underlying Action

Six-year-old Quantez Castillo and his mother, Endria Castillo, lived in an apartment building owned by Nathan Korman. Korman did not maintain the heater in the Castillos' apartment and on a December day in 2000, Quantez placed his hands over an open flame to try to get warm. His pajamas caught on fire and he suffered second and third degree burns.

In December 2001, Quantez (represented by Mardirossian & Associates, Inc.) sued Korman for negligence, breach of the warranty of habitability, and willful failure to warn, seeking both compensatory and punitive damages.[1] When served with summons and the complaint, Korman tendered his defense to his insurer, Republic Western Insurance Company, which insured the building under a $1 million general liability policy. Republic Western retained John Hill &

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[1] Quantez's mother was a named plaintiff, alleging that she had "witnessed her son burning," but her claim was not submitted to the jury.

Associates to defend Korman, and Korman told Hill that the heater in Quantez's apartment was in fact working at the time of the fire (and that he had maintenance records to establish regular inspections). In July 2002, in response to a motion by Korman to strike Quantez's punitive damage claim, Quantez voluntarily dismissed his claim for punitive damages without prejudice.

In September (at which time a mediation was tentatively scheduled for December), Quantez served on Korman (by service on Hill) an offer to compromise for $1 million. (Code Civ. Proc., § 998.)[2] Mardirossian and Hill talked, and agreed the offer would remain open until the mediation took place. In November (before the mediation), Hill's services were terminated and Murchison & Cumming substituted in as Korman's attorney of record.

By this time, Republic Western's claims manager (John Aye) was aware that Quantez had made a policy limits demand (which was beyond Aye's authority and required approval of Republic Western's board of directors). In Aye's opinion, there were insufficient facts to support a policy limits settlement and he did not at any point during Hill's representation of Korman (or ever) "recommend to [his] superiors or the [board of directors] that [Quantez's] policy limits demand be paid by Republic Western." Aye understood that, by not settling within policy limits, Republic Western "was taking the risk that any verdict for covered damages in excess of policy limits might ultimately be paid by Republic Western because it did not settle the case within policy limits when it had an opportunity to do so." Because there was no punitive damage claim at this time, Republic Western in essence made a business decision that the case

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[2] All section references are to the Code of Civil Procedure.

was not worth policy limits but that, if a jury ultimately disagreed, Republic Western would be financially responsible for any excess judgment. In late 2002 (before the mediation), Murchison (as Korman's attorney of record) responded to Quantez's offer to compromise by "basically saying [to Mardirossian], 'We think this is a case that is defensible, and we're hoping to get a defense verdict.'"

In February 2003 (with the offer to compromise still open), Murchison told Mardirossian that Republic Western had authorized him to offer $151,000 to settle the case, and Murchison also reported this fact to its client. Korman, in turn, wrote to Murchison: "I am in receipt of your letter dated February 26, 2003 in which you outlined the recent developments in [Quantez's] case. One of the developments discussed in your letter is the fact that you had offered $151,000 to [Quantez] . . . . [¶] I am formally requesting that you attempt to settle this case within the policy limits set forth in my insurance policy." Quantez rejected the $151,000 offer, insisting on policy limits, while Republic Western remained adamant that the case was not worth that much. Two settlement conferences and a mediation failed to change the parties' views.

Korman wrote to Murchison again in April: "After attending the Mandatory Settlement Conference last Thursday, March 27, 2003, with you and the representative from Republic Western . . . , it has become apparent to me that the insurance company is not acting in my best interests . . . . At the settlement conference, it became clear to me that Republic Western's failure to offer policy limits is increasing my exposure to financial damages in this case. I am once again formally requesting that Republic Western settle this case within policy limits prior to the trial date. [¶] In the event that [Quantez] is successful in

this case and obtains an award in excess of policy limits, I intend to hold Republic Western fully responsible for any personal financial loss in excess of my policy limits." There is no evidence that Korman ever offered to contribute any of his own funds toward a settlement.[3]

In June 2003, Quantez obtained leave to file an amended complaint asserting a claim for punitive damages. Discovery conducted after Hill had been replaced by Murchison established that, notwithstanding Korman's claim to the contrary, he had not maintained Quantez's apartment in a habitable condition (it was often infested with vermin and insects) and there was no heat.

The first phase of the case (liability and compensatory damages) was tried in October to a jury, which rendered its verdict in favor of Quantez and against Korman, fixed Quantez's compensatory damages at about $3.2 million, apportioned fault 75 percent to Korman, and 25 percent to others, and found by clear and convincing evidence that Korman had acted with oppression, fraud and malice. The second phase (punitive damages) was then tried to the same jury. While the jury was deliberating, Quantez, Korman, and Republic Western negotiated a "high-low" settlement, the terms of which were placed on the record. (§ 664.6.) Regardless of the jury's verdict, Republic Western agreed to pay $3 million ($2 million over policy limits) to Quantez for his compensatory damages. For his part, Korman agreed to pay a minimum of $800,000 (if the jury awarded $800,000 or less in punitive damages) and a maximum of $2.2 million

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[3] Korman's statement in his declaration that he first heard about the section 998 offer to compromise "long after it expired," and that, "[h]ad [he] been fully informed, [he] would have settled the case," is not evidence that he could or would have contributed his own money toward a settlement during the seven months he was represented by Hill or at any other time.

(even if the jury awarded more than that amount in punitive damages). The jury ultimately awarded Quantez about $3 million in punitive damages, so that Korman paid Quantez $2.2 million in punitive damages (and Republic Western paid the agreed $3 million to Quantez).[4]

The Legal Malpractice Action

In October 2004, Korman sued Hill for legal malpractice and breach of contract, alleging that Hill had failed to conduct an adequate investigation and thus failed to discover that Quantez's policy limits demand would have been a fair settlement of the underlying case. Korman also alleged that Hill never communicated Quantez's section 998 offer to compromise to Korman or to Republic Western and that, as a result, Korman "was denied the opportunity to settle [Quantez's] case for policy limits before going to trial."

Hill answered, conducted discovery, and in November 2005 moved for summary judgment, contending Korman could not establish a causal connection between any alleged error or omission by Hill and the injury to Korman -- because the cause of the "missed settlement" in the underlying action was Republic Western's refusal to settle the case for policy limits (it is undisputed that Republic Western was at all times before trial unwilling to settle for policy limits), and because Hill substituted out long before Quantez's offer to compromise expired (leaving Korman and Murchison, his new lawyer, with more than a year to accept the section 998 offer). Hill also contended that public

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[4] Both sides waived post-trial motions and appeal and, as agreed, the case was dismissed without entry of a judgment -- but Korman reserved his rights against Republic Western and did not give it a release.

policy considerations barred Korman's effort to shift his liability for punitive damages to his attorneys.

Over Korman's opposition, the trial court granted Hill's motion for summary judgment on public policy grounds.

DISCUSSION

In a series of related arguments, Korman contends that Hill was negligent (by failing to investigate and failing to communicate Quantez's offer to compromise to Korman), that Hill's negligence was the cause of Korman's injury (his payment of $2.2 million to Quantez), that there are no public policy reasons barring Korman's suit to recover punitive damages, and that summary judgment should have been denied. We disagree.

A.

To prevail at trial, Korman would have to establish that but for Hill's alleged negligence, Korman would have obtained a more favorable judgment or settlement in the underlying action -- that is, that the injury sustained by Korman was actually caused by Hill's malpractice. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241.) Thus, "the crucial causation inquiry is *what would have happened* if [Hill] had not been negligent." (*Id.* at p. 1242.)[5] The undisputed evidence shows that Korman cannot establish causation -- because notwithstanding Hill's communication to Republic Western about Korman's exposure and Republic

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[5] Korman's negligence and breach of contract claims are governed by the same rules. (*Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1022.)

Western's knowledge of Quantez's demand for policy limits, the insurer refused to settle for policy limits. Case law compels the conclusion that summary judgment was therefore proper.[6]

1.

In *Purdy v. Pacific Automobile Ins. Co.* (1984) 157 Cal.App.3d 59, the insured (Purdy) was sued by Partin for injuries suffered in a motorcycle accident. Purdy's insurer, Pacific Automobile Insurance Company, retained Roger W. Roberts to defend Purdy. Following an investigation, Roberts concluded Purdy was liable and recommended that Pacific settle for policy limits ($100,000). Pacific refused, and later refused Partin's offers to settle for policy limits, and a jury ultimately rendered a verdict against Purdy for more than $300,000. (*Id.* at pp. 67-70.) Purdy then sued Roberts and others, alleging that Roberts "negligently failed to effectuate a settlement" in the underlying action. (*Id.* at p. 75.) Roberts prevailed in the trial court and on appeal, where we found that Pacific, not Roberts, was the cause of Purdy's injury, and that there was "no causal connection between the advice given or not given to Pacific by [Roberts] and the actual harm done. Put another way, the *intervening* cause

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[6] Korman points to evidence showing that Republic Western blamed Hill for its losses (and told Hill to notify his malpractice carrier that he might be sued by Republic Western), apparently on the ground that Hill did not comply with Republic Western's procedures vis-à-vis a policy limit demand, but Korman does not explain how this fact affects our causation analysis. It does not -- it shows only that Republic Western may not have been fully informed when it fixed the settlement value of Quantez's case at $151,000. In any event, it is undisputed that Hill had substituted out months before Korman wrote to Murchison, his new lawyer, "formally requesting" that "Republic Western settle this case within policy limits prior to the trial date," that Murchison communicated his client's demand to Republic Western, and that Republic Western refused to settle for policy limits. It is also undisputed that, at the time Hill substituted out, Quantez's complaint did not seek punitive damages.

was the right exercised by Pacific . . . to pursue the course of conduct [it] chose." (*Id.* at p. 78.)

In *New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron* (2002) 99 Cal.App.4th 799, the insured (New Plumbing) was sued in several construction defect cases. Its insurer, Nationwide Mutual Insurance Company, retained Edwards to defend New Plumbing. Edwards investigated, then recommended to Nationwide that it settle the suits for an amount within policy limits, which Nationwide did. (*Id.* at p. 801.) New Plumbing nevertheless sued Edwards for legal malpractice, alleging the firm had not told New Plumbing about the settlement negotiations, had ignored valid defenses that would have absolved it of all liability and that, because of Edwards's negligence, New Plumbing had to pay higher premiums for less insurance coverage. (*Ibid.*) The trial court granted Edwards's motion for summary judgment, and Division Three of the Fourth District affirmed, holding that because Nationwide could settle without consulting New Plumbing and over its objection, Edwards's recommendation of settlement "was not a cause of any harm [New Plumbing] may have suffered." (*Id.* at p. 802.)

Purdy and *New Plumbing* -- discussed at length by Hill but completely ignored by Korman -- compel the conclusion that Korman cannot as a matter of law establish causation -- because the undisputed evidence shows that Republic Western at all times refused to settle for policy limits.

2.

Three additional facts support our conclusion that nothing Hill did or didn't do caused Korman's injury. First, the offer to settle for policy limits remained

open after Hill was replaced by Murchison (who rejected Quantez's settlement demands because he viewed the case as "defensible"). Second, punitive damages were not part of the equation at the time Hill represented Korman. Third, Korman never offered to contribute his own funds toward a settlement with Quantez.[7] Quite plainly, the settlement offer was rejected, and the case went to trial, because Republic Western, having made a business decision, adamantly refused to settle the case for policy limits. (*Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 210 [causation may be decided as a matter of law where the material facts are not disputed].)

B.

Our conclusion that Korman cannot establish causation makes it unnecessary to consider his challenge to the trial court's ruling that, for public policy reasons, he could not recover the punitive damages he paid to Quantez. (See *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310 [after a third party sued an insured and won an award that included punitive damages, the insured sued the insurer to recover as compensatory damages the amount paid for punitive damages, alleging the carrier had unreasonably refused to settle the underlying action; for public policy reasons, the Supreme Court held that the insured could not shift to the insurance company its responsibility for the

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[7] At oral argument, Korman's counsel insisted there is a triable issue of material fact about whether Korman would have used his own funds to settle the case had he known about the policy limits demand. We disagree. Korman's statement in his declaration opposing Hill's summary judgment motion -- that he would have "settled," not that he would have used his own money -- is pure speculation. At the time Hill withdrew, there was no claim for punitive damages and the carrier's refusal to settle for policy limits exposed it, not Korman, to damages exceeding policy limits. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 484 [a mere possibility of causation is not sufficient to defeat summary judgment, "and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to determine the issue in favor of the defendant as a matter of law"].)

punitive damage award].)[8] Assuming without deciding that (as Korman contends) the rule announced in *PPG Industries* does not apply to legal malpractice actions, or assuming (as Korman contends) that his part of the settlement was not in fact paid as punitive damages, Korman's inability to establish causation-in-fact nevertheless defeats his claim.

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[8] As the Supreme Court explained in *PPG Industries,* proximate cause is comprised of two elements, cause-in-fact (which we have found lacking in Korman's case) and public policy considerations that limit a defendant's liability for its acts. (*PPG Industries v. Transamerica Ins. Co., supra,* 20 Cal.4th at pp. 315-317 [the purposes of punitive damages are to punish the defendant and deter future misconduct, and public policy bars an intentional wrongdoer from shifting responsibility for its morally culpable behavior to its insurer].)

DISPOSITION

The judgment is affirmed. Hill is awarded his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, Acting P.J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.